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No. 75-343

In the Supreme Court of the United States

OCTOBER TERM, 1975

DISTRICT 153 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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This case presents the question of the right of an employer to enforce its rule forbidding off-duty employees from coming onto its premises against an employee who, in connection with a union election campaign, seeks to distribute union literature and to talk to employees on the parking lot of a company plant some 4 1/2 miles away from the plant where he works (Pet. App. 19a, 33a). The Board, adopting the opinion of its Law Judge, followed *GTE Lenkurt, inc.*, 204 NLRB 921, and held that enforcement of the company rule did not violate Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) (Pet. App. 4a-37a; see 33a). In *GTE Lenkurt*, the Board had found that the status of an off-duty employee is more nearly analogous to that of a non-employee than it is to that

of an on-duty employee,[1] and concluded that union solicitation by an off-duty employee was governed by *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, which held that non-employees may lawfully be barred from entering an employer's premises to engage in union activity unless it is shown that no adequate alternative means of communication are available. Accord: *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539.[2] Cf. *Bulova Watch Co.*, 208 NLRB 798 (distinguishing *GTE Lenkurt* "because that case involved admission to the plant itself and did not involve employee access to outside areas of the premises").

The court of appeals affirmed the Board's decision in an unpublished order without opinion (Pet. App. 1a).[3] Rehearing *en banc* was denied (Pet. App. 3a).

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[1]In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, the Court held that an employer may not prohibit employees lawfully on the premises from engaging in union solicitation on their own time unless it is shown that the restriction is necessary to maintain production or discipline.

[2]As pointed out in the Board's brief (pp. 13-15) in *Hudgens* v. *National Labor Relations Board*, No. 74-773, argued October 14, 1975, different principles govern the right of employees to engage in consumer picketing on property which has assumed "to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co., supra*, 407 U.S. at 547. (A copy of the *Hudgens* brief has been served on petitioner.)

[3]Local Rule 8(b) of the Rules of the District of Columbia Circuit provides in pertinent part:

> Unpublished orders including explanatory memoranda of this Court are not to be cited in briefs or memoranda of counsel as precedent. However, counsel may refer to such orders, and memoranda, for such purposes as application of doctrines of res judicata, collateral estoppel, and law of the case, which turn on the binding effect of the judgment, and not on its quality as precedent.

1. The question whether, in striking the balance between employee organizational rights and employer property rights on purely private property, off-duty employees should be treated like on-duty employees or like non-employees is one which Congress has entrusted primarily to the Board to answer. See *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 326. The Board's conclusion that employees, while off duty, should be governed by the principles applicable to non-employees as to access to the premises for distribution of literature is not unreasonable and therefore the court below properly declined to disturb it.

An employer invites on-duty employees onto his property to work and, having done so, he cannot deny them the use of that property for organizational purposes where there is no showing that such use would interfere with production or discipline. Non-employees ordinarily have no permission to enter onto the employer's property, but may nonetheless do so if there is no other way for them to have access to the employees for union solicitation. Accordingly, the Board reasonably concluded that, as in the case of non-employees, the employer's property rights are entitled to greater weight, when weighed against the off-duty employee's right of access to the premises for organizational purposes, than when weighed against the rights of employees who are on the premises for work.

2. The conflict of decisions among the circuits, cited by petitioner (Pet. 13-14), has not matured to the point where it warrants resolution by this Court. The *per curiam* order entered by the court below has no precedential value (n. 3, *supra*), and hence would not preclude a *de novo* consideration of the issue in the District of Columbia Circuit. Moreover, while the Third

Circuit has recognized a distinction between off-duty employees and on-duty employees,[4] and the Fifth Circuit has declined to do so,[5] it is not clear that the Fifth Circuit would accord off-duty employees the same access rights as on-duty employees in a situation where, as here, they seek access to company property located some distance from their normal workplace. See *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 277 F.2d 759, 762-764 (C.A. 5) (employer lawfully barred off-duty employees of one of its retail stores from engaging in union solicitation in the non-public area of another of its stores). There is thus no conflict among the circuits on the factual situation presented by this case.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] *Diamond Shamrock Co.* v. *National Labor Relations Board*, 443 F. 2d 52. However, in that case, the court emphasized that the off-duty employees were not barred from union solicitation "on all company premises outside the fence," but only "from returning to or remaining on the plant premises *inside* the fence after working hours" (*id.* at 56).

[5] *Republic Aluminum Co.* v. *National Labor Relations Board*, 394 F. 2d 405; *National Labor Relations Board* v. *Litho Press of San Antonio*, 512 F. 2d 73, 76.